



POLICE DEPARTMENT

September 6, 2011

MEMORANDUM FOR: Police Commissioner

Re: Lieutenant David Nilsen
Tax Registry No. 913881
Detective Borough Staten Island
Disciplinary Case No. 84486/08

The above-named member of the Department appeared before the Court on March 4, 2011, April 15, 2011, and May 12, 2011, charged with the following:

1. Said Lieutenant David Nilsen, assigned to Staten Island Homicide Task Force, while on duty, on or about and between September 19, 2007 through October 19, 2007, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, in that on approximately five (5) occasions, he either improperly arrived late or left early his assigned command, without permission or authorization. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT

2. Said Lieutenant David Nilsen, assigned as indicated in Specification No. 1, on or about the date indicated in Specification No. 1, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, in that said Lieutenant did submit overtime slips and did receive compensation for 3 hours and 58 minutes of overtime for which said Lieutenant did not perform. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

3. Said Lieutenant David Nilsen, assigned as indicated in Specification No. 1, on or about August 28, 2007, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, in that said Lieutenant failed to submit a UF-28 Leave of Absence Report for one (1) hour.

P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT

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4. Said Lieutenant David Nilsen, assigned as indicated in Specification No. 1, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, in that on November 28, 2007, said Lieutenant failed to sign out; and on November 22, 2007 and November 29, 2007, said Lieutenant failed to sign in and/or out.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

5. Said Lieutenant David Nilsen, assigned as indicated in Specification No. 1, while on duty, on or about and between August 2, 2007 through November 27, 2007 did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, in that on thirteen (13) separate occasions said Lieutenant did use his private vehicle while on duty for official business without permission or authority. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT

The Department was represented by Hiram Lopez, Esq., Department Advocate's Office, and Respondent was represented by Peter Brill, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty of Specification No. 4, Not Guilty of Specification Nos. 3 and 5, and Guilty in Part of Specification Nos. 1 and 2.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Sergeant Anthony Bocola and Detective Frank Demonte as witnesses.

Sergeant Anthony Bocola

Bocola, a 16-year member of the Department, was assigned to the Detective Bureau Investigations Unit (DBIU). On July 27, 2007, he was assigned to investigate Respondent after an anonymous complaint was made to the Chief of Detectives (COD) that Respondent (commanding officer of the Staten Island Homicide Task Force [SIHTF]) was misusing time.

As part of his investigation, Bocola conducted visual observations and video surveillance. A vehicle, equipped with a camera and video recorder, was parked in the vicinity of Respondent's residence on various occasions. As part of the investigation, Bocola also obtained the command log, overtime log and roll calls from Respondent's command.

In addition, with the assistance of the Technical Assistance Response Unit (TARU), a global positioning system (GPS) tracking device was placed on Respondent's private vehicle. Department Exhibit (DX) 2 was a copy of the memorandum from the commanding officer of DBIU to TARU, requesting the installation of the tracking device and surveillance camera. It indicated that the tracking device should be installed on a Nissan Pathfinder. Bocola explained that his contact in TARU, Detective Frank Demonte, had advised him that installing a GPS on a member's private vehicle was within Department guidelines and also permitted under then-existing New York State law (warrantless installation of GPS was only barred in May 2009, by a ruling of the Court of Appeals, see People v. Weaver, 12 N.Y.3d 433 [2009]).

Bocola subsequently prepared a worksheet based on the information gathered (see DX 1, worksheet dated Oct. 15, 2010).

Through his investigation, Bocola learned that on five occasions Respondent either arrived late to his command, left early, or was at his residence while on duty. Bocola testified that on September 19, 2007, the command log showed Respondent as being present for duty via

outside wire (PFDOW) at 0800 hours. He did not end his tour until 2025, and he submitted an overtime slip for four hours for that day. According to the GPS device, however, Respondent's personal vehicle did not leave his residence, on [REDACTED], until 0820, arriving at the 120 Precinct at 0854 (see Respondent's Exhibit [RX] A, GPS data sheet for Sept. 18-14, 2007). According to Bocola, Respondent was misusing time for the 54 minutes that morning that he claimed he was working but actually was not.

Department records indicated that Respondent worked from 0800 until 1825 hours on September 20, 2007. He signed himself into the SIHTF command log at 0740, and submitted an overtime slip for two hours. According to the GPS, however, Respondent's vehicle did not leave his residence until 0804, arriving at the command at 0845. The device also showed that he actually left the command that evening at 1711, arriving home at 1738.

For October 16, 2007, the command log showed Respondent as PFDOW at the 120 Precinct at 1300 hours. He worked until 0025 the following day, earning three hours of overtime. According to video surveillance, however, Respondent did not leave his residence until 1305. Bocola estimated that, based on the directions feature of Google Maps, Respondent would have arrived at the command approximately 20 minutes later.

On October 19, 2007, Respondent worked from 0900 to 1925, making two hours of overtime. Bocola stated that Lieutenant Valez, one of his team members, observed a Department vehicle assigned to Respondent's command parked in Respondent's driveway that day between 1900 and 1920, a period during which Respondent should have been at work.

According to the command log, Respondent left work an hour early on August 28, 2007. No record was found, though, of the hour being deducted from Respondent's time-leave bank. Bocola also discovered that on November 28, 2007, Respondent failed to sign out in the

command log. On November 22 and 29, 2007, he failed to sign both in and out. Bocola made these determinations by reviewing the command logs from both the 120 Precinct as well as Detective Borough Staten Island.¹

Bocola testified that on 13 occasions Respondent used his private vehicle while on duty for official business. Respondent's vehicle was not authorized for Department use. On August 2, 2007, Respondent was personally observed leaving his command in his vehicle at 1605 hours and returning to the command at 1815. Bocola testified that his findings concerning the 12 other occasions were based upon command log entries showing that Respondent was present for duty or end of tour "in his personal auto."

On cross-examination, Bocola testified that as a member of SIHTF, Respondent had borough-wide jurisdiction, meaning he did not necessarily have to report to his command and sign in there before starting his tour at another location.

Bocola concluded that Respondent used his personal vehicle for Department business on 12 occasions because there was no Radio Motor Patrol number listed in the command log. Respondent regularly worked with detectives from other Staten Island commands, however, and Bocola conceded that it was an equally logical conclusion that Respondent was driven by another member of the service on the 12 days in question. No personal observation was made of Respondent using his car on any of those days.

Bocola explained that a member of the service was not entitled to use his private vehicle while on duty for breaks, such as meal, because such an officer was still on duty.

On November 2, 2007 (one of the days that Respondent allegedly used his personal vehicle), the SIHTF command log indicated that he was PFDOW in a private vehicle at the 120

¹ Upon review of the 120 Precinct command log, as presented by Respondent's counsel at trial, the Advocate confirmed that Respondent did, in fact, sign in on November 22, 2007 (see Court Exhibit 1, command log entry). The Advocate subsequently moved for the reference to this date in Specification No. 4 to be dismissed.

Precinct at 0935 hours. Although the command log at the 120 Precinct should have had a corresponding 0935 entry for Respondent, Bocola did not review it. Similarly, for other dates in question (November 5, 15 and 16, 2007), the SIHTF command log indicated that Respondent signed in via outside wire, but Bocola did not look at corresponding command log entries at other commands.

For November 27, 2007, the SIHTF command log indicated that Respondent was end of tour via outside wire in a private vehicle at the 120 Precinct. Bocola agreed that the allegation that Respondent left his command in his private vehicle that day assumed that Respondent's private vehicle was at his command. He conceded that it was possible that Respondent left his private vehicle at the 120 Precinct station house at the start of tour, then received a ride in a Department vehicle from his command to the 120 Precinct to retrieve the car at end of tour.

As for November 23, 2007 (another date that Respondent allegedly used his personal vehicle), Bocola personally observed Respondent at a shopping plaza at 0745. Respondent had signed in via outside wire that day at 0740. Because it was an outside wire, Respondent was not the person who actually made the log entry. Respondent's tour was not scheduled to start until 0800 that day, so he was not paid for any time before then.

Bocola testified that on July 25, 2007, he ran a Department of Motor Vehicles (DMV) inquiry to see what kind of vehicle Respondent owned. It was a red Honda Civic. On August 22, 2007, Bocola submitted the GPS request to TARU. Bocola himself was not present for the installation of the GPS, but he let TARU personnel know where Respondent's car could be found.

Video surveillance of Respondent began in October 2007. In response to questioning concerning a videotape generated on October 3, 2007, and reviewed by Bocola from that day

until the next day, Bocola admitted that the black and white videotape was a "little grainy sometimes, hard to view." Bocola also conceded that he did not receive any independent information indicating that Respondent actually possessed the Honda Civic on October 3, 2007, or that he owned it, such as a title document or other documentation. Bocola further acknowledged that Respondent stated in his official Department interview that he no longer owned the Civic as he had sold it almost a year earlier and "the plates were destroyed," i.e., he returned them to the DMV. Nevertheless, Bocola testified, it appeared on the tape that Respondent got into a Honda Civic when he last watched it on October 4, 2007. Upon further questioning, Bocola admitted that he no longer believed that Respondent was the individual getting into the Civic. In any event, the specification charging Respondent with using his private vehicle on October 3, 2007, was based upon a review of the command logs.

Bocola testified that a High Intensity Drug Trafficking Area (HIDTA) intelligence request (see Court Exhibit 2) was submitted to investigate Respondent. He claimed that the purpose of making a HIDTA request was to gather information concerning property, relatives, vehicles, off-duty employment, and licenses of the subject individual.

With respect to an allegation that Respondent failed to submit a Leave of Absence Report, or '28', for the hour he left early on August 28, 2007, Bocola testified that he made this determination based upon his review of the Leave Integrity Management System (LIMS) and the SIHTF command log. The roll call showed that Respondent was on vacation on August 29, August 30, and August 31, had regular days off on September 1 and September 2, and took another vacation day on September 3, 2007. Bocola contended that it was Respondent's responsibility if the LIMS system failed to show that he submitted his required forms, and his

responsibility to verify whether his papers were in fact submitted. Bocola admitted that he did not know how long it took for a '28' to be reflected in LIMS.

Bocola stated that with respect to allegations of Respondent arriving late to or leaving early from his assigned command, Bocola denied knowing whether or not Respondent routinely worked either after or before his scheduled tour without submitting for overtime. Bocola, who was familiar with Staten Island, testified that 34 minutes was a reasonable commuting time between Respondent's residence and the 120 Precinct station house. He also believed that 41 minutes was a reasonable commuting time to SIHTF. He conceded that nobody knew who was in Respondent's vehicle at the end of his tour on September 20, 2007, when the GPS device picked up the vehicle.

Bocola was unaware that on either September 19 or September 20, 2007, there was an investigation into a shooting at the Castleton Houses. Bocola testified that where a member was called into work early for a homicide, for example, he was required to go to his command in order to pick up a Department vehicle and use it while on duty. That member's tour would begin as soon as he got the call.

With respect to personal observations of Respondent at his residence either after he signed into the command log or before he signed out, Bocola could not recall whether, on October 16, 2007, the tape that was in the video camera was placed there by him. He accordingly could not confirm whether the person who in fact put the videotape in checked the camera to see if it corresponded to the correct time. With regard to October 19, 2007, Bocola did not know why Respondent was at home during the time in question, nor could he recall whether he questioned Respondent about it at his official Department interview. Bocola did not know whether Respondent returned to work after 1920. Bocola acknowledged that Valez indicated on

worksheets that he observed a Honda Civic in Respondent's driveway even though Respondent no longer owned that car on that date. Bocola conceded that it was impossible for the Civic to be at Respondent's residence with the license plate that was registered to Respondent (because the plates had been destroyed by the DMV).

Bocola testified that he had no record as to where Respondent was working on November 28 and 29, 2007.

Bocola denied that his commanding officer told him to "ramp up the investigation" because he was getting pressure from higher-ranking officials after earlier observations had not shown that Respondent was guilty of misconduct.

Detective Frank Demonte

Demonte was assigned to TARU. He explained that GPS pinpointed one's location on earth by "speaking" to several satellites.

Demonte testified that when an investigative unit requested the installation of a GPS unit, the investigator provided TARU with the make, model, plate number, and any other pertinent identifying information for the car involved. After an installation date was set, TARU personnel prepared the GPS device by giving it a "good visual inspection," making sure that it is "in working order," not cracked or broken, and that there were no missing parts. At that point, TARU placed fresh batteries in the unit and tested it. The test was performed by either putting the GPS in a vehicle and driving around, or by putting it in a stationary vehicle for one to two hours. The data was then downloaded and checked to confirm that the GPS was properly indicating its location.

Between 2005 and 2008, Demonte performed approximately twelve GPS installations, but had no independent recollection of any of them. Information on the jobs would have been kept in a now-defunct database. Therefore, Demonte admitted, TARU had no records on the GPS installation that was performed on Respondent's private vehicle.

On cross-examination, Demonte admitted that TARU worksheets were intentionally kept vague because so much of what the unit did was "confidential."

Regarding the installation of a GPS on Respondent's private vehicle, Demonte could not recall whether or not he went onto Respondent's private property.

Demonte did not know whether the time indicated by the GPS device was transmitted by the satellite or recorded by the unit. He checked, however, to make sure that the unit was reading to the correct time. One set the device's clock by merely setting the time zone.

Upon questioning by the Court, Demonte explained that the data received from the GPS was initially expressed in latitude and longitude. Computers in the TARU office subsequently translated the data into street addresses.

Respondent's Case

Respondent called Deputy Inspector Michael Baldassano as a witness and testified on his own behalf.

Deputy Inspector Michael Baldassano

Baldassano was the commanding officer of Detective Borough Staten Island. Respondent was his subordinate. Baldassano described Respondent's work as "well above standards" and in his opinion, Respondent was his "best squad commander. One of the best

squad commanders I have ever worked with.” Baldassano characterized Respondent’s responsiveness to the needs of the command as “well above anything [he] could ever expect.” He said he could speak to Respondent after every shooting or homicide, whether during the day or in the middle of the night.

Baldassano was responsible for approving Respondent’s overtime. Baldassano testified that Respondent did not put in for compensation every time he did something outside of his normal tour. For instance, Respondent did not put in for overtime when Baldassano spoke to Respondent at home during off duty hours. Respondent similarly did not put in for overtime when Baldassano asked Respondent to call the squad to see how a case was progressing. Baldassano said that if there was a shooting in the command, he expected Respondent to respond regardless of the time of day and specifically, to respond directly to the shooting location and start an investigation without the delay spent on picking up a Department vehicle.

Recently, Baldassano became aware that Respondent’s private vehicle was not authorized for Department use, which he characterized as an “oversight” as opposed to an intentional act on the part of Respondent. Since then, “we rectified that situation.” Baldassano did not think that Respondent would have had any difficulty receiving such authorization from Inspector Lavin, the command’s previous commanding officer.

On cross-examination, Baldassano testified that in order to get authorization to use a private vehicle while on duty, members had to fill out an official Department form, which was sent to the borough for approval, then up the chain of command. Baldassano said that he had no knowledge of whether or not Respondent had such authorization from August 2007 to November 2007.

Respondent

Respondent, a 20-year member of the Department, was assigned to the Staten Island Homicide Task Force as the commanding officer. He had been assigned there since May 2006 and was responsible for investigating shootings and homicides. His office was located in a building on Edgewater Plaza on Staten Island.

Respondent testified that at some point after he started working in SIHTF, he became aware of a personality conflict within COD. Specifically, he learned that Assistant Chief Giannelli, who was the executive officer of the Detective Bureau, did not get along with Chief of Detectives George Brown. Respondent believed this conflict affected him. In particular, in December 2006, Respondent investigated the high-profile homicide of a retired member of the service. A day after Respondent got involved in the case, he received a telephone call from COD to contact Chief of Department Joseph Esposito in order to brief him on what had transpired. Respondent later found out that Brown and Lieutenant King, Brown's operations coordinator, were unhappy with him talking directly to Esposito.

Respondent explained that the way he started his tour varied. Although he was assigned as SIHTF commanding officer, he and his detectives investigated more than just homicides. For instance, they were used by the borough as a response task force for a variety of high-profile cases. When Respondent had to respond to such cases, he would immediately respond to the precinct where the incident occurred. In fact, he rarely went directly to his office. Instead, he went to the specific precinct where an investigation was being coordinated or to the location of occurrence. He explained that he could start his tour at any number of Department facilities in addition to crime scene and witness locations. He maintained an Activity Log as a means of recording when he responded to a location and when he returned to a location.

Respondent admitted that in non-emergency situations, he was not supposed to use his private vehicle. He usually responded to the precinct of occurrence, where he would pick up a Department vehicle. The reason he did this instead of getting a Department vehicle at SIHTF was that the task force only had two cars assigned for its use. When he took out a car, he generally assigned a detective as his driver. It would have been the detective's name that appeared in the command log and movement log pertaining to the car. When he responded to other commands, Respondent sometimes opted not to sign himself in or out of those commands' movement logs since he would have already signed himself out in the SIHTF movement log.

Respondent testified that he was called in the middle of the night on September 19, 2007. There had been a non-fatal shooting and an individual was in custody. A little before 0700 hours, he got another call informing him that there was a "subject" still outstanding. At that point, Respondent then left his girlfriend's house, where he had been staying that night, to respond to the scene. Once on the scene, Respondent spoke to several people and ensured that a crime scene was established. Prior to returning to "work," Respondent, who had left his girlfriend's house in sweatpants and a T-shirt, went home first to put on a suit. Even though Respondent's tour was indicated that day as 0800 to 2025, and despite the fact that he had come in early, he did not adjust his tour. He did, however, put in for overtime for the end of his tour.

Respondent confirmed that he often reported PFDOW. On these occasions, one of the four detectives assigned to his squad would have signed him into the command log. As the supervisor, he reviewed those entries at a later date. At the time of this incident, he was not required to maintain an Activity Log, so the only thing he could check the command log entries against was his daily personal sheets.

Respondent testified that he used his private vehicle to get to the crime scene on September 19, 2007, because “in [his] opinion, at that time it was for the good of the Department, not for the good of [him]self” that he be present. Respondent pointed out that if he had used a Department vehicle to go home to change his clothes that day, it would have been misconstrued as if he was taking a Department vehicle home.

Respondent confirmed that he never filled out the paperwork to have his private vehicle authorized for use on duty, but believed that his supervisors would have granted the authorization. Respondent testified that although he sometimes used his private vehicle when responding to an imminent emergency incident, none of the higher-ranking members of the Department present on those scenes ever said anything to him about his use of a non-Department vehicle.

Respondent was still investigating the September 19 shooting on September 20, 2007. Early that morning, his supervisor contacted him to say that the subject was believed to be located in an apartment in the West Brighton Houses. The supervisor asked Respondent to come before his tour was scheduled to begin and respond to the scene. Respondent went to the location of the occurrence instead of going first to his office. His normal commute from residence to office was 10 to 15 minutes without traffic, and with traffic it could be up to half an hour. Respondent could not specifically recall whether he arrived at his office at 0845 hours, but he was paid as having begun his tour at 0800 that day. As for the entry in the command log showing him PFDOW at 0740, Respondent stated that it was common practice in detective squads that if the supervisors showed up a little early and, for instance, their tour began at 0800 and the detectives' tour began at 0745, the supervisors would put down 0740 as the beginning of

their tour so as not to "block out" the detectives. That is, the detectives could then put down 0745 as their starting time.

With respect to the GPS data indicating that Respondent left work on September 20, 2007, 74 minutes prior to the end of his tour, Respondent explained that he in fact stayed later at the office but that his girlfriend had picked up his private vehicle and drove it to his residence. Her car was out of service at the time, and Respondent got a ride home that day from the detectives at his squad. Respondent stayed over at his girlfriend's house two or three times a week; the rest of the week they stayed at his house.

With respect to October 16, 2007, Respondent testified that from what he could recall "nothing important had happened." Respondent normally left for work at least 15 minutes prior to the start of his tour, but he sometimes left earlier depending on traffic conditions. To the best of his recollection, Respondent left his residence like he normally did and arrived at work on time that day. He reported directly to the 120 Precinct station house, which was closer to his house than his office was. The ride would have taken him approximately 10 minutes.

Regarding August 28, 2007, Respondent testified that when he signed out in the command log, he indicated in the comment section that he was taking one hour of lost time. He prepared a '28', left it on the command log, and adjusted the roll call. At the same time, he prepared '28's for the vacation he was starting the following day. Respondent explained that the normal practice was to put '28's and overtime slips in Department mail to be forwarded for processing. Respondent said that he followed this practice on this occasion. Only the lost-time form for August 28, 2007, was unprocessed.

Regarding his failure to sign in and out in the command log in November 2007, Respondent explained that on November 28, 2007, he was preparing for the next day's Compstat

meeting. He went end of tour at 1700 or 1715 and rushed to pick up his two children, forgetting to sign out. Respondent was a divorced father of two, and Wednesdays were his visitation days. At 1900, after dinner with the children, he received a telephone call from the borough informing him that he was needed for further Compstat preparation at the 122 Precinct. He ended up working until 0430 on November 29, 2007, at which point he went home to get dressed for Compstat. He was back at the 122 Precinct station house by 0600, but failed to sign in, and then drove to Police Headquarters for the meeting. After the meeting ended at 1200, Respondent returned to Staten Island and went end of tour a little after 1400. At that point, he had been up for approximately 36 hours, and he got straight into his car and left.

With respect to his alleged possession of a Honda Civic, Respondent explained that he had in fact leased a Civic toward the end of 2003, but had traded it for a 2006 Nissan Pathfinder on October 31, 2006. He surrendered the plates for the Honda on November 1, 2006 (see RX B, DMV receipt indicating Respondent's surrender of CUW6601 plates, registered to 2004 Honda, on Nov. 1, 2006, and subsequent destruction of plates).

On cross-examination, Respondent revealed that he signed in at 0740 as opposed to 0800 "a lot of the time" in 2007 and 2008.

Respondent testified that he did not have a Department-issued vehicle at the time of trial. Although Respondent was not authorized to use his private vehicle for Department use while on duty in 2007, he currently was authorized.

Upon questioning by the Court, Respondent stated that he was able to recall what occurred on September 20, 2007, for example, by going through his notes and case folders, digging into his memory, and comparing those events to the dates charged in the specifications.

FINDINGS AND ANALYSISSpecification Nos. 1 & 2

In the first specification, it is charged that Respondent, “on approximately five (5) occasions . . . either improperly arrived late or left early his assigned command, without permission or authorization.” In the second specification, it is charged that on the same five occasions, Respondent “did submit overtime slips and did receive compensation for 3 hours and 58 minutes of overtime for which [he] did not perform.” These occasions, as alleged at trial, were four dates: September 19, September 20 (twice), October 16, and October 19, 2007.

At the outset, it should be noted that many of the allegations here were based on GPS data (see RX A, data package) that, the Department said, was gathered from a device placed by TARU on Respondent’s private vehicle. Respondent’s counsel argued that this was unreliable because TARU had no records that the device was actually placed there; it just had the ‘49’ from DBIU requesting it be done. As a result, no one testified that the GPS device had actually been installed or when it was installed.

In any event, the allegation for September 19, 2007, is based on GPS data that showed Respondent’s personal vehicle leaving his residence at 0820 and arriving at the 120 Precinct at 0854. His unadjusted tour, however, began at 0800. Respondent explained that he had actually come into work early, getting a call in the middle of the night about a shooting and going to the scene at around 0700 in sweatpants and a T-shirt. He then came home, put on a suit, and went to the office.

Respondent gave a reasonable explanation of the discrepancy here. If he went to a crime scene at 0700, stayed briefly, and went home to change clothing, it is reasonable that he arrived back at the office at 0854. The Department did not refute Respondent’s assertion that there was

a shooting to which he had to respond early. In fact, the GPS data showed Respondent's personal vehicle starting motion at 0656, and at various specific Staten Island locations other than his [REDACTED] residence between 0728 and 0742, before returning to his residence. This supports Respondent's version of events.

As to September 20, 2007, the Department alleged that Respondent's scheduled tour was 0800 until 1825. He signed himself into the SIHTF command log at 0740, but his vehicle, as per GPS, did not leave his residence until 0804, arriving at the command at 0845. The device also showed that he actually left the command that evening at 1711, arriving home at 1738.

Respondent testified that the shooting investigation from September 19, 2007, continued into the 20th. He again went to the scene before going to his office after getting an early-morning phone call. He could not recall arriving at his command at 0845, however, and did not state that he went home first. Respondent explained that his girlfriend took his car home that day because hers was in the shop. He got a ride home from a colleague.

Again, Respondent gave a reasonable explanation of what occurred. He went to a crime scene and thus did not "arrive late" to work. Again, the GPS data showed his private vehicle starting motion at 0715 and returning to his residence sometime between 0733 and 0744. Furthermore, no personal observations of the vehicle were made, so Respondent's assertion that his girlfriend was driving his car that evening could not be confirmed or refuted.

For October 16, 2007, the command log showed Respondent as PFDOW at the 120 Precinct at 1300 hours. He worked until 0025 the next day. According to video surveillance, however, Respondent did not leave his residence until 1305. Based on both testimony of Bocola and Respondent, this ride would have taken 10 to 20 minutes. He filed for three hours of overtime. For this date, Respondent could not give an explanation for the discrepancy. He did

not testify about October 19, 2007, on which an investigator observed a Department vehicle assigned to Respondent's command parked in his driveway that day between 1900 and 1920, a period during which Respondent should have been at work, as he reported working from 0900 to 1925. He filed for two hours of overtime.

Thus, the Department demonstrated that on two of the five charged occasions, Respondent either arrived at work late or left early, without permission or authorization. Additionally, for only two of these dates did the Department prove that Respondent submitted overtime slips, and received overtime, for work he did not actually perform. This unperformed time, according to the worksheet of the main investigator, Bocola, totaled 45 minutes.

As such, the Court finds Respondent Guilty in Part of Specification Nos. 1 and 2.

Specification No. 3

In the third specification, Respondent is charged with failing to submit a '28' for the one hour of lost time taken on August 28, 2007. Bocola testified that the Leave Integrity Management System did not reflect any '28'. Respondent testified that he did prepare a '28' and left it on the command log. At the same time, he prepared '28's for the vacation he was starting the following day. Only the lost-time form for August 28, 2007, however, never got processed. Bocola agreed that the roll call showed Respondent taking vacation days on August 29, August 30, and August 31, 2007. He had regular days off the next two days, and took a third vacation day on September 3, 2007 (Labor Day).

There are thus two main possibilities. Either Respondent put in '28's for the other four relevant days but did not for August 28, 2007; or Respondent put them in for all five days and the '28' for the day in dispute did not make it into LIMS, literally getting lost in the shuffle.

The Court finds Respondent's version more likely. '28's are small, non-standard pieces of paper. It is certainly imaginable that one could get lost. The Court is not simply giving Respondent the benefit of the doubt here, however. The fact that four other contemporaneous '28's made it into the system, but one did not, is strong evidence in support of Respondent's assertion that that one fell through the cracks. This stands in opposition to the Department's view that Respondent filed four '28's and either forgot to file the one for August 28, 2007, or obstinately refused to do so, and is now lying about this relatively minor alleged offense.

Accordingly, the Court finds Respondent Not Guilty of Specification No. 3.

Specification No. 4

In the fourth specification, Respondent is charged with failing to sign out of work on November 28, 2007, and that he "failed to sign in and/or out" on November 29, 2007. (After further review of the roll call, the Advocate moved to dismiss the portion of the specification charging a failure in this regard on November 22, 2007. The Court grants that motion.)

Respondent admitted that he failed to sign out on November 28, 2007, and failed to sign in and out on November 29, 2007. He attributed this to a combination of working extremely long hours preparing for Compstat and running to pick up his children for visitation. Accordingly, the Court finds him Guilty of Specification No. 4.

Specification No. 5

In the fifth specification, it is charged that Respondent, on 13 occasions, used his private vehicle while on duty for official business without permission or authority. Bocola stated that the charge for only one of these occasions was predicated on an actual observation of

Respondent in his private vehicle. The rest were based on the fact that Respondent had signed in to the command log via outside wire, without listing an RMP number, so he must have been in his own car. Bocola admitted that it was just as possible that Respondent was riding in a Department vehicle with other members of the service on these 12 occasions. Respondent, on the other hand, admitted that he drove to crime scenes in his private vehicle if he was responding there from home. Often the crime scene location was between his home and his command, so it would have made little sense to bypass the scene just to pick up a Department vehicle.

The rule against use of private vehicles while on duty is a sound one, and it can be said that Respondent's actions were a technical violation of the rule. Here, however, Respondent was the commanding officer of a borough-wide homicide squad. He was called at home on a regular basis to report to crime scenes. The Department provided no evidence to show that Respondent was using his own car out of convenience or laziness. The record supports Respondent's assertion that he was using his private vehicle out of necessity. He simply wanted to respond to crime scenes as soon as possible.

Accordingly, the Court finds Respondent Not Guilty of Specification No. 5.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on April 30, 1991. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

In July 2007, a wide-ranging and intensive investigation was launched against Respondent for misusing time. Over the next four months, investigators tracked and surveilled him using video, personal observation, and a GPS device surreptitiously placed on his private vehicle. The investigation went so far as to seek intelligence from the New York/New Jersey HIDTA, an agency that is supposed to investigate drug trafficking. In assessing a penalty, the Court is mindful of the fact that out of the countless work days examined, there were two for which Respondent could not provide an explanation.

The Advocate recommended a penalty of 10 vacation days, but Respondent has been found Not Guilty of most of the charged infractions. All that remain are two dates for which he was unable to explain discrepancies in his time records versus actual location, and a single 24-hour span in which he twice neglected to sign in and out. The Court also notes Respondent's excellent work history, see Confidential Mem., infra. Accordingly, the Court recommends that Respondent forfeit 5 vacation days as a penalty.

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED
MAR 26 2012

RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
LIEUTENANT DAVID NILSEN
TAX REGISTRY NO. 913881
DISCIPLINARY CASE NO. 84486/08

Respondent received an overall rating of 5.0 “Extremely Competent” on his last three annual performance evaluations. He has been awarded one medal for Exceptional Merit, two for Meritorious Police Duty, ten for Excellent Police Duty, and one Commendation. [REDACTED] He has no prior formal disciplinary record.

For your consideration.



David S. Weisel
Assistant Deputy Commissioner – Trials